Petition

No. 81-232

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS P. MATHERS, ET AL.,
Petitioners,

v.

WILLARD A. MORRIS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES SUPREME COURT

THOMAS P. MATHERS, et al.,

Petitioners

v.

WILLARD A. MORRIS, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE REFUSAL OF MARYLAND ELECTION OFFICIALS, PURSUANT TO ARTICLE 33, SECTION 9A-1, TO DESIGNATE THE POLITICAL AFFILIATION OF A CANDIDATE ON THE BALLOT, WHO HAS OTHERWISE QUALIFIED FOR BALLOT POSITION, BURDENS FUNDAMENTAL RIGHTS?

II. WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE APPROPRIATE TEST WHERE FUNDAMENTAL RIGHTS ARE BURDENED IS THAT OF STRICT SCRUTINY?

III. WHETHER THE DISTRICT COURT ERRED IN APPLYING A LESSER TEST THAN THAT OF STRICT SCRUTINY?

IV. WHETHER THE REFUSAL OF STATE ELECTION OFFICIALS, PURSUANT TO ARTICLE 33, SECTION 9A-1, TO DESIGNATE THE POLITICAL AFFILIATION OF A CANDIDATE WHO HAS

OTHERWISE QUALIFIED FOR BALLOT POSITION, SERVES ANY COMPELLING STATE INTEREST?

V. WHETHER THE REFUSAL OF MARYLAND ELECTION OFFICIALS, PURSUANT TO ARTICLE 33, SECTION 9A-1, TO DESIGNATE THE POLITICAL AFFILIATION OF A CANDIDATE WHO HAS OTHERWISE QUALIFIED FOR BALLOT POSITION, IS THE LEAST DRASTIC MEANS AVAILABLE TO ACCOMPLISH ANY COMPELLING STATE INTEREST?

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1. The parties to the proceeding in the United States District Court for the District of Maryland and in the United States Court of Appeals for the Fourth Circuit:

Plaintiffs: Thomas P. Mathers, E. Christine Fishbeck, and the Libertarian Party of Maryland.

Defendants: Willard A. Morris in his official capacity as State Administrator of the Election Laws, Theodore N. Clark in his official capacity as Chairman of the State Administrative Board of Election Laws, James W. Johnson in his official capacity as Vice-chairman of the State Administrative Board of Election Laws, Reginald A. Asplen in his official capacity as a member of the State Administrative Board of Election Laws, Karen Lancaster in her official capacity as a member of the State Administrative Board of Election Laws, Sylvia Raphael in her official capacity as a member of the State Administrative Board of Election Laws, and the State Administrative Board of Election Laws.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

JURISDICTIONAL GROUNDS.....1

STATUTES.....2

STATEMENT OF THE CASE.....9

ARGUMENT.....18

I. The District Court was correct in holding that Maryland's statutory scheme burdens fundamental rights.....18

II. The District Court was correct in holding that the appropriate test where fundamental rights are burdened is that of strict scrutiny.....22

III. The District Court erred in applying a different test than that of strict scrutiny.....25

IV. The State of Maryland has failed to demonstrate any compelling state interests to be served by Article 33, Section 9A-1.....27

V. The State of Maryland has failed to demonstrate that the means employed are the least drastic means available to accomplish any state interest.....34

CONCLUSION.....36

TABLE OF AUTHORITIES

CASES:

American Party of Texas v. White,
415 U.S. 767 (1974).....23

Anderson v. Celebrezze,
499 F.Supp. 121 (1980).....21

Anderson v. Morris,
636 F.2d 55 (4th Cir. 1980),
aff'g, 500 F.Supp. 1095 (D.Md)....26

Anderson v. Morris,
500 F.Supp. 1095 (D.Md. 1980).....27

Bachrach v. Sec'y of Com.,
415 N.E.2d 832 (Mass. 1981)...21, 35

Dunn v. Blumstein,
405 U.S. 330 (1972).....23

Illinois Elections Bd. v.
Socialist Workers Party,
440 U.S. 173 (1979).....23 ,24, 25

Mathers v. Morris, 649 F.2d 280
(4th Cir. 1981)(per curiam),
aff'g, Civil No. Y-81-622
(D.Md. April 24, 1981).....passim

Mathers v. Morris, Civil No. Y-81-622
(D.Md. April 24, 1981).....passim

NAACP v. Button, 371 U.S. 415
(1963).....22

Storer v. Brown, 415 U.S. 724
(1974).....20, 24

Williams v. Rhodes, 393 U.S. 23
(1968).....passim

STATUTES:

Article 33, Section 1-1(a)(15)....passim

Section 4A.....6

Section 4A-3.....2, 10

Section 4B-1.....passim

Section 4B-1(a).....3

Section 4B-1(h).....3

Section 4C-1.....passim

Section 4C-1(a).....4, 5

Section 4C-1(b).....4, 5

Section 4C-1(c).....6

Section 5-1.....3

Section 7-1(b)(1).....6

Section 7-1(b)(2).....6, 10

Section 7-1(c)(3).....7, 10

Section 9A-1.....passim

Section 22-1(b).....passim

28 U.S.C. Section 1254(1).....1

Section 1331.....12

Section 1343(3).....12

Section 1343(4).....12

42 U.S.C. Section 1983.....12

MISCELLANEOUS:

H. Res. 80, 97th Cong.,
1st Sess. (1981).....9

Supreme Court Rule 21.3.....17

JURISDICTIONAL GROUNDS

On May 6, 1981, the United States Court of Appeals for the Fourth Circuit filed a per curiam opinion[1] denying the relief sought by the petitioners in the instant case and affirming the Judgment of the United States District Court for the District of Maryland.[2] In so doing, the Court of Appeals for the Fourth Circuit held that a state statute, Article 33, Section 9A-1, of the Annotated Code of Maryland, was constitutional as applied to the petitioners, in conflict with the applicable decisions of this Court. Pursuant to the provisions of 28 U.S.C. Section 1254(1), this Honorable Court may, in its discretion, properly grant this Petition for Writ of Certiorari and review this case.

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1. Mathers v. Morris, 649 F.2d 280.
2. Mathers v. Morris, Civil No. Y-81-622 (April 28, 1981).

STATUTES

ARTICLE 33, OF THE ANNOTATED CODE OF MARYLAND.

Section 1-1(a)(15). "Party" or "political party" as used in this article means an organized group of the electorate that attempts to control government through the election of its candidates to office, and which either:

(i) Polled 3 percent or more of the entire vote cast in the State in the last general election held in the State; or

(ii) Filed a valid petition for the formation of a political party pursuant to Section 4B-1 of this article. But, if any such party loses its status as a political party pursuant to the provisions of Section 4C-1 of this article, then it shall cease to be a "party" or "political party" for purposes of this article.

Section 4A-3. When filed. . . . Certificates of candidacy for an office to be filled by a special election pursuant to Section 22-1(b) of this article, shall be received and filed in the office of the appropriate board not later than nine p.m. on the Monday which is three weeks or

twenty-one days before the day on which the special primary election is to be held under the Governor's proclamation setting the date for the special primary election. . . .

Section 4B-1. New political parties.

(a) Formation.--Any group of voters wishing to form a new political party shall do so by filing with the State Administrative Board of Election Laws a petition for formation of a political party which shall declare their intention of organizing a State political party, the name of which shall be stated in the petition together with the name and address of the State chairman thereof and the names and addresses of at least twenty-five persons who shall be designated as constituting the governing body of the party. Appended to the petition in the manner hereinafter provided shall be papers bearing the signatures of at least ten thousand qualified voters of the State. . . .

(h) Nomination by petition.--Unless the party is required to select its nominees for public office by primary election pursuant to Section 5-1 of this article, the nominees for public office of the party shall be se-

lected in the manner provided in the interim constitution and by-laws of the party, but no such nominee shall appear upon the ballot at any general election unless the nominee has complied with all the requirements of the provisions of the subtitle "Nomination by Petition" of this article, including the filing of petitions with the election board or the several boards of the State, which shall bear in addition to the name of the nominee, the name of the party, signed not less than three percent (3%) of the registered voters who are eligible to vote for the office for which election at the general election is sought. . . .

Section 4C-1. Loss of status as political party; revival.

(a) Party polling less than three per centum of vote.--If in any general election at which the voters of the State voted for candidates for President of the United States or Governor of the State,. any political pary polls less than three per centum of the entire vote cast in the State, as determined in subsection (b) of this section, such party shall cease to be a political party for purposes of this article, and shall be so advised by the State Administrative Board of Election Laws.

(b) Determination of per centum of entire vote cast.--The determination of whether a political party polled three per centum or less of the entire vote cast in the State in any general election for purposes of subsection (a) of this section shall be made as follows:

(i) In any general election at which the voters of the State vote for candidates for President of the United States, the total number of votes cast for the party's nominees for the offices of President of the United States, and the United States Senator (if a United States Senator from this State was elected at such general election), must equal or exceed three per centum of the total number of votes cast at such general election for all candidates for all such offices; or

(ii) In any general election at which the voters of the State vote for candidates for Governor of this State, the total number of votes cast for the party's nominees for the offices of United States Senator (if a United States Senator from this State was elected at such general election), Governor of this State, Comptroller of this State, and Attorney General of this State, must equal or exceed three

per centum of the total number of votes cast at the general election for all candidates for all such offices.

(c) Revival of party.--If a party loses its status as a political party for purposes of this article pursuant to subsection (a) of this section, such party may at any time regain its status as a political party for purposes of this article by filing a valid petition for formation of a political party pursuant to the provisions of Section 4B-1 of this article.

Section 7-1. General provisions.

(b) Filing certificate of candidacy; petitions required to be filed.--(1) A candidate for public office seeking nomination by petition shall file a certificate of candidacy at the time and place and in the manner provided in Subtitle 4A of this article and shall comply with all other applicable provisions of the subtitle, in the same manner as candidates for nomination at a primary election.

(2) In order to have the name of a proposed candidate placed on the ballot under this section, the candidate shall file with the appropriate board petitions signed by not less than 3 percent

of the registered voters who are eligible to vote for the office for which the nomination by petition is sought. Petitions shall be filed as required by subsection (c) of this section. . . .

(c) Time of filing petitions.--(3) In the case of a candidate for an office to be filed (sic) pursuant to Section 22-1(b) of this article, a petition that contains the total required number of signatures shall be filed with the appropriate board at the time required for the filing of a certicate of candidacy for the office.

Section 9A-1. Party designation on ballot.

A candidate for public office may not designate the political party with which he is affiliated on the ballot at any election held hereunder unless such party is a political party as defined in Section 1-1(a)(15). Candidates for public office who are not affiliated with a political party as defined in Section 1-1(a)(15) hereof shall be classified under the heading "other candidates" on the ballot. The provisions of this section shall not apply, however, to candidates for public office who are registered as an independent.

Section 22-1(b) Vacancies.--If a vacancy in the office of Representative in Congress should occur by death, resignation or otherwise, the Governor shall, except as hereinafter provided, issue a proclamation directing that a special primary election and a special election be held to fill the vacancy. . . .

STATEMENT OF THE CASE

On February 24, 1981, the office of United States Representative for the Fifth Congressional District of Maryland was declared vacant by resolution of the United States House of Representatives,[3] due to the incapacitating illness of Representative Gladys Noon Spellman. Two days later, the Governor of Maryland issued a proclamation, pursuant to Article 33, Section 22-1(b), of the Annotated Code of Maryland,[4] directing that a special election be held on April 7, 1981, and a special election be held on May 19, 1981, to fill the vacancy. On March 6, 1981, the Libertarian Party of Maryland nominated Mr. Thomas P. Mathers as its candidate for that special election.

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3. H. Res. 80, 97th Cong., 1st Sess. (1981).
4. All references to Article 33 refer to the Annotated Code of Maryland.

On March 10, 1981, Mr. Mathers met with Willard A. Morris, the Administrator of the State Administrative Board of Election Laws, in an attempt to file a certificate of candidacy for the special election. Mr. Morris refused to accept the certificate of candidacy because it was not accompanied by the requisite number of signatures required by Article 33, Section 7-1(b)(2). Mr. Morris informed Mr. Mathers that, pursuant to Article 33, Sections 7-1(c)(3) and 4A-3, he had until March 16, 1981, to submit a petition for nomination signed by three percent of the registered voters eligible to vote in the special election, or in the instant case, 5,436 signatures of voters within the Fifth Congressional District. The March 16 deadline fell twenty-one days before the special primary election in which the candidates of the two major political parties would be

chosen.

On March 16, 1981, Mr. Mathers submitted a certificate of candidacy accompanied by 1,156 signatures but was officially denied a place on the special election ballot. Mr. Mathers tendered an additional 6,309 signatures on April 7, 1981, the date of the special primary election, but these signatures were refused by State election officials. Each petition for nomination stated that Mr. Mathers was a Libertarian candidate.

On March 19, 1981, anticipating the refusal of State election officials to accept signatures tendered after the statutory filing deadline, Mr. Mathers, together with E. Christine Fishbeck, a registered voter eligible to vote in the special election and desirous of effectively casting her ballot for Mr. Mathers, and the Libertarian Party of Maryland filed a Complaint for Declaratory and

Injunctive Relief in the United States District Court for the District of Maryland. The jurisdiction of the Ditrict Court was founded upon the First and Fourteenth Amendments to the Constitution of the United States, and upon 28 U.S.C. Sections 1331, 1343(3), 1343(4), and 42 U.S.C. Section 1983. The amount in controversy, exclusive of interest and costs, exceeded $10,000.

In their Complaint the plaintiffs expressly presented three questions for consideration by the Court. First, that Maryland's requirement that a candidate for nomination by petition for a special election, held pursuant to Article 33, Section 22-1(b), submit a petition that contains the total number of signatures necessary for nomination by petition at the same time the candidate files his certificate of candidacy, not later than three weeks prior to the special primary

election in which the candidates of the political parties that nominate by primary election are chosen, was unconstitutional as applied to plaintiffs Thomas P. Mathers and E. Christine Fishbeck. Second, that Maryland's prohibition, pursuant to Article 33, Section 9A-1, that a candidate for public office may not designate his political affiliation on the ballot unless he is affiliated with a "political party" or "party" as defined in Article 33, Section 1-1(a)(15), was unconstitutional as applied to plaintiffs Thomas P. Mathers, E. Christine Fishbeck and Libertarian Party of Maryland. And third, that Maryland's revocation, pursuant to Article 33, Section 4C-1, of the status of the Libertarian Party of Maryland as a "political party" as defined in Article 33, Section 1-1(a)(15) was unconstitutional as applied to plaintiffs Thomas P. Mathers, E. Christine Fishbeck

and Libertarian Party of Maryland.

On April 24, 1981, the Honorable Joseph H. Young, United States District Judge, filed a Memorandum Opinion and Order[5] granting, in part, the relief sought by the plaintiffs. Judge Young directed State election officials to accept all signatures tendered by Mr Mathers on or before the date of the special primary election for the purposes of fulfilling the statutory requirements for nomination by petition. Judge Young further directed that if Mr. Mathers were found to be otherwise qualified that his name be listed on the ballot in the special election. Judge Young, however, did not require State election officials to designate the political affiliation of Mr. Mathers on the ballot in the special election and, in so doing, held that Article 33, Section 9A-1 was constitu-

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5. Mathers v. Morris, Civil No. Y-81-622 (D.Md. April 24, 1981).

tional as applied to the plaintiffs. The substance of the Memorandum Opinion and Order was incorporated in a Judgment filed on April 28, 1981.

Plaintiffs filed an appeal from that part of the Judgment which did not require State election officials to designate the political affiliation of Mr. Mathers on the special election ballot, again asserting that Article 33, Section 9A-1 was unconstitutional as applied. On May 6, 1981, a panel of the United States Court of Appeals for the Fourth Circuit affirmed, in a per curiam opinion, on the basis of the Memorandum Opinion of Judge Young.[6]

Subsequently, State election officials determined that, as of April 7, 1981, Mr. Mathers had submitted enough valid signatures on his petition for nomination to meet the statutory require-

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6. Mathers v. Morris, 649 F.2d 280 (1981).

ment of three percent of all the registered voters eligible to vote in the special election. State election officials further determined that Mr. Mathers was otherwise qualified to appear on the ballot.

Mr. Mathers' name did appear on the ballot in the special election beside the names of the nominees of the Democratic and Republican parties nominated in the special primary election. Stenny Hoyer, the Democratic nominee was designated as a "Democrat" on the ballot, Audrey Scott, the Republican nominee, was designated a "Republican." Relying on the constitutional validity of Article 33, Section 9A-1, however, State election officials designated Mr. Mathers as an "Other Candidate."

Although the specific questions addressed in the instant case were glossed over by both the District Court and

the Court of Appeals for the Fourth Circuit, the issues were presented and preserved for appeal. In the District Court, the petitioners' attack on the constitutional validity of Article 33, Section 9A-1 was fully briefed in the Plaintiff's First Supplemental Memorandum in Support of Motion for Preliminary Injunction, indeed was the only question addressed in that Memorandum. Before the Fourth Circuit, the issues were again raised and preserved in the single Memorandum for Appellees/Cross-Appellants, at 12-28.[7]

It is in this posture that the instant case is brought before this Honorable Court.

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7. Petitioners have not appended these materials to this Petition for Writ of Certiorari. See Supreme Court Rule 21.3.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT MARYLAND'S STATUTORY SCHEME BURDENS FUNDAMENTAL RIGHTS.

Article 33, Section 9A-1, of the Annotated Code of Maryland, clearly treats the candidates of minority political parties differently than it treats the candidates of the major political parties or independent candidates. A nominee of a major political party may designate his political affiliation on the ballot while the nominees of minority political parties that are not "political parties," as defined in Article 33, Section 1-1(a)(15), may not. Instead minority party candidates must run for election for public office under the label of "Other Candidate." Independent candidates are expressly exempted by the statute and may be designated on the

ballot as "Independent."

The intended and obvious effect of the State's refusal to list the political affiliation of minority party candidates is to burden them with disability. Either the candidate must collect the ten thousand additional signatures necessary to qualify his political party as a "political party," as defined in Article 33, Section 1-1(a)(15), or he must run as a "mystery" candidate. Maryland's statutory scheme is designed to deprive the electorate of information concerning a minority party candidate's views, platform and political affiliation while, at the same time, insuring that comparable information is readily available on the ballot concerning the major party candidates. What the State of Maryland sought, and has indeed accomplished, is to deprive minority party candidates of

their political base and force them to run as independent candidates.

As the Supreme Court has observed, "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, 415 U.S. 724, 745 (1974). "Those harsher restrictions, applicable only to candidates who are not members of major political parties, clearly result in a burden upon fundamental rights and implicate equal protection guarantees." Mathers v. Morris, Memorandum Opinion and Order, (D.Md. April 24, 1981) at 4.

Not only are the fundamental rights of the candidate burdened but also the rights of each of the electorate who wishes to cast his vote effectively for that candidate.

"The right of individuals to

> associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms."

Williams v. Rhodes, 393 U.S. 23, 30 (1968). For political organizations, as well as for candidates,

> "ballot placement may signal the political viability of a campaign and trigger funding, media coverage, and credibility in the minds of voters. All serve to open channels for the dissemination of the candidate's <and the political organization's> political message."

Anderson v. Celebrezze, 499 F.Supp. 121, 126 (1980). To paraphrase the Court in Bachrach v. Sec'y of Com., 415 N.E.2d 832, 836 (Mass. 1981), "other candidate" is hardly a rallying cry!

The District Court correctly noted that "<i>t is manifest that such interests are at stake in the instant case since Maryland law . . . prevents voters

from effectively voting for him <Mathers> in the election." Mathers v. Morris, Memorandum Opinion and Order, (D.Md. April 24, 1981) at 4.

II. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE APPROPRIATE TEST WHERE FUNDAMENTAL RIGHTS ARE BURDENED IS THAT OF STRICT SCRUTINY.

The District Court was correct in finding that where fundamental rights are burdened, the State must demonstrate that the statute in question serves a compelling state interest and employs the least drastic means available to accomplish that interest:

> "As the Supreme Court stated in Williams v. Rhodes, supra:
>
> "'In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest of a subject within the State's constitutional power to regulate can justify limiting first amendment freedoms.' NAACP v. Button, 371 U.S. 415, 438

(1963).'

> "393 U.S. at 31. Furthermore, even where there is a compelling state interest involved, it has been required 'that States adopt the least drastic means to achieve their ends.' Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 185 (1979)."

Mathers v. Morris, Memorandum Opinion and Order (D.Md April 24, 1981) at 5.

It is clear that the appropriate standard of review mandated by the Constitution is that of strict scrutiny. American Party of Texas v. White, 415 U.S. 767, 780 (1974)("whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination against <minority> parties . . ., their validity depends upon whether they are necessary to further compelling state interests."); Dunn v. Blumstein, 405 U.S. 330, 335 (1972)("as a general matter, before that

right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 184 (1979)("When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest."); Storer v. Brown, 415 U.S. 724, 729 (1974)("substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest.")

As the teachings of the Supreme Court make clear, substantial burdens on fundamental rights must be justified by a

compelling state interest and must adopt the least restrictive means available.

III. THE DISTRICT COURT ERRED IN APPLYING A DIFFERENT TEST THAN THAT OF STRICT SCRUTINY.

The District Court correctly held that fundamental rights are at stake in this case. Mathers v. Morris, Memorandum Opinion and Order (D.Md. April 24, 1981) at 4. The District Court also correctly noted that Maryland's statutory scheme imposes unequal burdens on the candidate and members of the Libertarian Party of Maryland and on candidates and members of the major political parties, implicating equal protection guarantees. Id. The District Court correctly quoted Supreme Court cases setting forth the appropriate standard of review mandated by the Constitution. Id. at 5 (quoting Williams v. Rhodes, 393 U.S. 23, 31 (1968); Illinois Election Bd. v. Socialist Workers Party,

440 U.S. 173, 185 (1979)).

The District Court, however, inexplicably applied a different standard of review than that of strict scrutiny. Instead, the District Court applied a two factor test:

> "First, is the restriction necessary to serve a substantial state interest, and, second, if so, is it unduly burdensome on the right of an independent candidate to gain access to the ballot."

Id. at 5 (citing dicta in Anderson v. Morris, 636 F.2d 55, 57 (4th Cir. 1980).

Because a "substantial" state interest is a lesser standard to meet than a "compelling" one, and because "unduly" burdensome is less exacting in its application than "least drastic means," it is manifest that the District Court applied a lesser standard than that mandated by the Supreme Court. In applying this lesser standard, the District Court

erred. It should be noted that the same District Court employed the correct constitutional standard of review in Anderson v. Morris, 500 F.Supp. 1095 (1980):

> "First, is there a compelling state interest which justifies that kind of restriction? Second, is the restriction the least drastic means available to achieve that interest?"

Id. at 1099. It is the essence of the Equal Protection Clause that the constitutional rights of the petitioners deserve the same degree of protection accorded the plaintiffs in Anderson.

IV. THE STATE OF MARYLAND HAS FAILED TO DEMONSTRATE ANY COMPELLING STATE INTERESTS TO BE SERVED BY ARTICLE 33, SECTION 9A-1.

While the State of Maryland has asserted several important state interests in support of its refusal to grant the Libertarian Party of Maryland status as an officially sanctioned "political par-

ty," defined in Article 33, Section 1-1(a)(15), the State has failed to assert any compelling interest to justify its refusal to list the political affiliation of a candidate whose name is already qualified to appear on the ballot.

Because the instant case was submitted to the District Court on the basis of Memoranda of Law, by agreement of the parties, the only interests asserted by the State of Maryland are found in its Memorandum:

> "Precluding from the ballot persons and parties such as those represented by the Plaintiffs serves the crucial policy of maintaining a political system free from factionalism, laundry list ballots, and splinter groups. In short, voter confusion is minimized, political stability is enhanced, and the possibility for effective free exchange of ideas is increased and protected, not diminished."

Mathers v. Morris, Defendant's Memorandum in Support of Motion for Summary Judgment

(D.Md. April 24, 1981) at 24.

The asserted state interests putatively achieved by Article 33, Section 9A-1, of avoiding factionalism, laundry list ballots, and splinter groups are totally inapplicable to the issue presented in this case. Mr. Mathers had already earned his place on the ballot after demonstrating that he had a significant modicum of support by submitting a petition for nomination signed by more than three percent of the voters eligible to vote in the special election. These voters were already demonstrably unhappy with the choices provided by the two major political parties. Including the political affiliation of Mr. Mathers on the ballot could not create factionalism or create a splinter group.

Clearly the State's asserted interest in avoiding laundry lists ballots is

not applicable to the instant case. After the decision of the District Court, the State Administrative Board of Election Laws determined for itself that Mr. Mathers was qualified for a position on the ballot. The inclusion of his political affiliation on the ballot would not serve to lengthen the ballot or increase the number of choices presented to the voters.

The arguments that the State's refusal to list Mr. Mathers' political affiliation will reduce voter confusion, enhance political stability, or increase the possibility for the effective free exchange of ideas are also specious. In actuality, the inclusion of the candidate's political affiliation after his name on the ballot would further promote these interests. Article 33, Section 9A-1, operates in a manner contrary to

each of the asserted state goals as applied in the present case. It is impossible to understand how forcing one of three candidates whose names appeared on the ballot to run as "Brand X" serves to avoid voter confusion. Voters otherwise inclined to vote for Mr. Mathers because he is a "Libertarian" may, when confronted by the designation of "Other Candidate", vote for one of the alternatives on the ballot because of confusion as to his political current affiliation, his sponsoring political organization, or his platform--confusion which could be avoided by including his political affiliation on the ballot.

The possibility for the effective free exchange of ideas can only be diminished by the instant application of Article 33, Section 9A-1. The statute actually serves to keep the electorate in

ignorance as to the political affiliation of Thomas P. Mathers and is counter-productive to this asserted state interest. The effective free exchange of ideas can hardly be fostered when the political affiliation of a candidate whose name appears on the ballot are suppressed. Article 33, Section 9A-1, as applied in the instant case, can only increase voter confusion and stifle political expression.

The statute is also counter-productive to the third asserted state interest, that of enhancing political stability. It defies comprehension to view a statute as enhancing political stability where, as here, it increases voter confusion and diminishes political expression, unless by "enhancing political stability" the State really seeks to insure the continued supremacy of the pre-

sent major parties.

Petitioners concede that the interests asserted by the State are important, however, the asserted state interests fail to approach the status of "compelling", particularly as Article 33, Section 9A-1 was applied to the circumstances in this case. Each of the interests asserted by the State fails once a candidate has otherwise qualified to appear on the ballot. Mr. Mathers did qualify for ballot position, however, and the asserted state interests of avoiding voter confusion, increasing the possibility for the free exchange of ideas, and political stability are best protected by including the political affiliation of Thomas P. Mathers after his name on the ballot.

It may very well be that important state interests may be best preserved by

omitting the political affiliation of all candidates from the ballot, but once the State undertakes to list the political affiliation, or the lack of affiliation, of some candidates, equal protection demands that the State make designate the political affiliation of all candidates. What is sauce for the goose is sauce for the gander.

V. THE STATE OF MARYLAND HAS FAILED TO DEMONSTRATE THAT THE MEANS EMPLOYED ARE THE LEAST DRASTIC MEANS AVAILABLE TO ACCOMPLISH ANY STATE INTEREST.

Even granting, arguendo, that the State's refusal to list the political affiliation of a minority party candidate on the ballot serves some state interest, the State of Maryland has failed to carry its burden of proof that the means employed are the "least drastic" means available to accomplish that purpose. Indeed the State's refusal to list a minority party candidate's political affi-

liation are in every way counter-productive to any state interest that could be asserted and thus the prohibition can not be rationally related to the purpose asserted. See Bachrach v. Sec'y of Com., 415 N.E.2d 832 (Mass. 1981).

CONCLUSION

In this Petition for Writ of Certiorari, the petitioners have argued that Maryland's refusal to designate the political affiliation of a minority party candidate on the ballot burdens fundamental rights and implicates equal protection guarantees. Where fundamental rights, such as the freedoms of speech and political association and the right to cast one's vote effectively, are burdened and equal protection guarantees are implicated, the validity of State statutes are suspect and subject to strict constitutional scrutiny. The appropriate test where strict constitititutional scrutiny is required is that the statute in question must be necessary to accomplish some compelling state interest and be the least drastic means available to accomplish that end.

The State of Maryland has failed to demonstrate any compelling state interest served by its refusal to list the political affiliation of a minority party candidate who has otherwise qualified for the ballot while at the same time listing the political affiliation or lack of affiliation of all the other candidates on the ballot. Finally, even if some compelling interest, or bundle of state interests which together are compelling, can be found to justify imposing substantial burdens on these most important of fundamental rights, the State has failed to demonstrate that it has employed the less drastic means available to accomplish that purpose, or indeed, that the statute in question is even reasonably related to the accomplishment of that purpose.

Accordingly, the petitioners

respectfully request this Honorable Court declare Article 33, Section 9A-1 unconstitutional as applied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THOMAS P. MATHERS, et al.

v.

WILLARD A. MORRIS, et al.

CIVIL NO.

Y-81-622

Filed: April 24, 1981

Robert J. Booze, Esquire, Rockville, Maryland and Stuart R. Blatt, Esquire, Baltimore, Maryland, counsel for the plaintiffs.

Stephen H. Sachs, Esquire, Attorney General for the State of Maryland, Baltimore, Maryland, and Alfred L. Scanlan, Jr., Esquire, Assistant Attorney General for the State of Maryland, counsel for the defendants.

YOUNG, United States District Judge

MEMORANDUM OPINION AND ORDER

Thomas P. Mathers, the nominee of the Libertarian Party of Maryland for the special election to the United States Congress in the Fifth Congressional District, has filed suit against Maryland Election Officials challenging the constitutionality of state laws which have thus far prevented him from being placed

on the special general (sic) election ballot. Joining Mathers as plaintiffs are E. Christine Fishbeck, a registered voter eligible to vote in the special general (sic) election, who wishes to cast her vote for Mathers, and the Libertarian Party of Maryland, the officially afiliated state party organization for the National Libertarian Party. The plaintiffs have filed a motion for injunctive relief and the defendants have moved for summary judgment. Since the parties have filed a joint stipulation of facts and the issues relevant to the upcoming special general (sic) election are ripe for disposition, those issues will be resolved on an expedited basis pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure. The relief sought by plaintiffs unrelated to

<page 1>

the upcoming special election, which has

not yet been addressed by the parties, will not be considered at this time.*

The plaintiffs assert that the number of signatures required for nomination by petition, together with the early deadline imposed for filing the total required number of signatures and the relatively short time period available in which to gather the signatures, impose an unconstitutional burden on the freedoms of speech and association, protected by the First and Fourteenth Amendments to the Constitution, and the fundamental right to vote, protected by the Fourteenth Amendment to the Constitution.

The plaintiffs also contend that, if Mathers is allowed on the ballot, he should be allowed to designate his political affiliation and that the provisions of Art. 33, Section 9A-1 prohibiting such designation on the ballot unless the candidate is affiliatied with a "politi-

cal party" or "party" as defined in Art. 33, Section 1-1(a)(15), is unconstitutional as applied to the candidate and the Libertarian Party of Maryland.

For reasons stated below, this Court has concluded that the timing of the deadlines for submitting the total number of required signatures represents an unconstitutional restriction under the circumstances of this special election and that the State Election Officials must accept the signatures tendered by the plaintiff on April 7, 1981. If a sufficient number of those signatures prove valid,

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* The only issue remaining unresolved in light of this Court's decision is the claim of plaintiffs in their original complaint that they are entitled to representation on the State Administrative Board of Election Laws. This claim was not included in the plaintiffs' subsequent pleadings. Accordingly, this claim is considered moot and/or abandoned by plaintiffs and that portion of the requested relief is denied without prejudice to be renewed by plaintiffs in future litigation, if such action is deemed appropriate by the plaintiffs.

and the candidate is found otherwise qualified, he must be placed on the ballot for the special general (sic) election. However, this Court is not persuaded that the candidate is entitled to have a designation of his political affiliation on the ballot as the State has determined that he has not met the requirements of Art. 33, Section 9A-1, the applicable provisions of which this Court finds constitutionally acceptable under the circumstances of this case.

FACTS

On February 24, 1981, the office of the United States Representative for the Fifth District of Maryland was declared vacant by resolution of the United States House of Representatives, due to the incapacitating illness of Representative-elect Gladys Noon Spellman. H. Res. 80,

97th Cong., 1st Sess. (1981). Two days later, the Governor of Maryland issued a proclamation pursuant to Article 33 section 22-1(b) of the Annotated Code of Maryland directing that the special primary election be held on April 7, 1981 and the special general (sic) election on May 19, 1981. On March 6, 1981, the Libertarian Party of Maryland nominated the plaintiff, Thomas P. Mathers, as its candidate for the Congressional seat to be filled by the special election. On March 10, 1981, Mathers met with Willard A. Morris, the Administrator of the State Administrative Board of Election Laws, in an attempt to file a certificate of candidacy for the special general (sic) election. Morris refused to accept the certificate of candidacy because it was not accompanied by the number of signatures required under Art. 33, Section 7-1(b)(2) which in this case would be

5,436 signatures of eligible voters from within the Fifth Congressional District. Morris informed Mathers that he still had until March 16, 1981, to file his certificate of candidacy with the required number of signatures. On March 16, 1981, Mathers submitted 1,156 signatures but

<page 3>

was officially denied a place on the special election ballot. Mathers tendered an additional 6,309 signatures on April 7, 1981, the date of the special primary election, but the signatures were refused by election officials.

LEGAL DISCUSION

It has been held that the right to associate for political beliefs, and the right to cast one's vote effectively "rank among our most precious freedoms." Williams v. Rhodes, 393 U.S. 23, 30

(1968). It is manifest that such interests are at stake in the instant case since Maryland law precludes Mathers from appearing on the special general (sic) election ballot and also prevents voters from effectively voting for him in the election. It is also clear that Maryland law treats the plaintiffs differently than it treats the candidates and members of major political parties. The Election Code requires all candidates for Congress in a special election, except write-in candidates, to file certificates of candidacy not later than twenty-one days before the day on which the special primary election is to be held. Art. 33, Section 4A-3. However, non-major party candidates who will not be nominated by primary election, must also comply with the petition requirements at that time. Art. 33, Section 7-1. Those requirements include the filing of petitions signed by

not less than three percent of the registered voters who are eligible to vote for the office for which trhe nomination is sought, all of which must be filed at the same time as the certificate of candidacy. Art. 33, Sections 7-1(b)(2) & (c)(3). Those harsher restrictions, applicable only to candidates who are not members of major political parties, clearly result in a burden upon fundamental rights and implicate equal protection guarantees. As the Supreme Court stated in Williams v. Rhodes, Supra:

> "In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting first Amendment freedoms.' NAACP v. Button, 371 U.S. 415, 438 (1963)."

393 U.S. at 31. Furthermore, even where

there is a compelling state interest involved, it has been required "that States adopt the least drastic means to achieve their ends." Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185 (1979). This equal protection analysis was recently applied to provisions of the Maryland Election Code discriminating against Independent candidates for the Presidency and the Fourth Circuit phrased the test as follows:

> "In determining the validity of such a restriction, we perceive that we must consider two factors: first, is the restriction necessary to serve a substantial state interest, and, second, if so, is it unduly burdensome on the right of an independent candidate to gain access to the ballot."

Anderson v. Morris, 636 F.2d 55, 57 (4th Cir. 1980). Accordingly, the same two part analysis will be applied to the restrictions involved in the instant case.

The defendants have advanced a num-

ber of interests which purport to justify the restrictions imposed by the Election Code upon non-major political party candidates in special elections. The majority of th "state interests" address the general concern of the State that ballot access generally be limited to serious candidates. See, e.g. Lubin v. Panish, 415 U.S. 709 (1974). However, the plaintiffs do not contend that the required number of signatures for nomination by petition, standing alone, is unconstitutional. Such an argument would have little merit given that Maryland law requires signatures of only three percent of the eligible voters, while a requirement of five percent of the total votes cast in the last general election has been upheld. Storer v. Brown, 415 U.S. 724, 738-740 (1974);

<page 5>

see also, Anderson v. Morris, 500 F.Supp.

1095, 1100 n.6 (D.Md.), aff'd, 636 F.2d 55 (4th Cir. 1980). Rather, the plaintiffs argue that the required number of signatures in combination with the early deadline imposed for filing the signatures and the short time period available in which to gather signatures, unconstitutionally burdens their fundamental rights. See, McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

The only state interest which arguably supports the requirement that the total number of signatures be filed at the same time as the certificate of candidacy is the administrative interest in adequate time to verify petitions and print ballots. Salera v. Tucker, 399 F.Supp. 1258, 1267 (E.D.Pa. 1975), aff'd, 424 U.S. 959 (1976); Anderson v. Morris, supra, 500 F.Supp. at 1100. This state interest is particulary acute in the case of special elections where the unique and

untimely circumstances necessarily require an expedited and compressed schedule. However, the specific provisions of the Maryland statutory scheme for special elections do not support an argument based upon administrative interests. The Election Code requires that a petition containing the total number of required signatures be filed in the office of the apporopriate local board not later than twenty-one days before the day on which the special primary election is to be held. Art. 33, Sections 4A-3, 7-1(c)(3) and 7-1(f). The local board then has the reponsibility under the statute for verifying the signatures contained in the petitions. Art. 33, Section 7-1(g). However, the local board must submit those petitions to the State Administrative Board of Election Laws one week later, after verification and endorsement. Art. 33, Section 7-1(j)(3).

Since the statute itself expressly contemplates that seven days will be adequate for the local boards to verify the signatures submitted to them in the case of special election, there seems to be no valid reason why

<page 6>

the entire number of signatures should be requred three weeks before the date of the special primary election. The State has no substantial interest which would justify such an early deadline for the submission of the entire number of signatures, particularly since the major political party candidates will not be known until after the special primary election. Requiring the total number of signatures from non-major party candidates at the same time that major political party candidates are only required to submit a certificate of candidacy imposes harsher restrictions upon the for-

mer which simply cannot be justified under the statutory scheme. For that reason, the deadline for filing the total number of signatures must be found constitutionally invalid.

Since this Court finds the timing of the statutory scheme unnecessary to serve any substantial state interest, the second part of the constitutional test - the burden upon the fundamental rights of the plaintiffs - need not be applied. It should be noted, however, that restrictions upon ballot access often prove particularly burdensome within the context of special elections. The state interest in filling the vacant office will undoubtedly justify some restrictions upon candidates, both major party and non-major party ones. However, the State should exercise caution to assure that it does not sacrifice fundamental rights in its haste to fill the vacant

seat. If no substantial state interest is served by a restriction which treats non-major party cnadidates differently from major party candidates, such a restriction cannot be constitutionally enforced.

The plaintiffs filed this suit on March 19, 1981, three days after Mathers was officially denied a place on the special general (sic) election ballot for failure to submit the entire number of required signatures with his certificate of candidacy. This Court takes no position on what date should be set by statute as a deadline for the submission

<page 7>

of all required signatures, except to find that, under the circumstances of this case, no substantial state interest is served by requiring all such signatures by March 16, 1981. The plaintiffs tendered 6,309 signatures to State Elec-

tion Officials on April 7, 1981, the date of the special primary election, and defendants have taken steps to prepare alternate plans which would include Mathers on the ballot. Thus, the defendants must accept all signatures tendered by the plaintiffs on or before April 7, 1981, and if Mathers is found to be otherwise qualified, he must be placed on the special general (sic) election ballot.

The plaintiffs also seek to have the political affiliation of Mathers designated on the ballot in the upcoming special general (sic) election. Maryland law currently prohibits a candidate for public office from designating his political affiliation on the ballot unless he is affiliated with a "political party" or "party" as defined in Art. 33, Section 1-1(a)(15). Art. 33, Section 9A-1. The Libertarian Party had qualified as a political party prior to the November 4,

1980 Presidential Election by filing petitions signed by more than 10,000 qualified voters of the State. Art. 33, Section 4B-1. However, because of the failure of its presidential candidate to poll at least three percent of the vote statewide, the Libertarian Party lost its status as a political party under the statute. Art. 33, Section 4C-1.

The plaintiffs do not challenge the constitutionality of the general organizational requirements for a new political party under the statute. They admit that the State may constitutionally require new political parties to evidence some degree of support before they are granted party status on the ballot. However, the plaintiffs do contend that the provisions of the statute which resulted in the revocation of the political party status of the Libertarian Party as a result of its failure to poll three percent of the

entire vote in the last election are unconstitutionally burdensome, to the extent that such a requirement exceeds the requirements for initially gaining party status. Plaintiffs also contend that the combination of the required number of signatures for nomination of a candidate by petition and the required number of signatures for the formation of a political party prove unconstitutionally burdensome. For the reasons set forth below, this Court finds the plaintiffs' arguments unpersuasive and will not require the State to designate the political affiliation of Mathers in light of the failure of the Libertarian Party of Maryland to satisfy the applicable statutory requirements.

The Supreme Court has clearly recognized the state interest in requiring candidates and political parties to de-

monstrate some degree of support before granting them access to the ballot:

> "There is surely an important state in- terest in requiring some preliminary showing of a significant modicum of sup- port before printing the name of a poli- tical organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

Jenness v. Fortson, 403 U.S. 431 442 (1971); see also, American Party of Texas v. White, 415 U.S. 767, 789 (1974). The Maryland requirements that a political organization gather 10,000 signatures for initial qualification as a political party and that such a party poll at least three percent of the statewide vote in order to maintain such status obviously serve that substantial state interest. The requirement for initial qualification prevents frivolous political organizations from gaining access to the ballot and thereby serves to preserve the order

and integrity of the electoral process. The provisions of Art. 33, Section 4C-1

<page 9>

which govern loss of status as a political party serve the same state interest by assuring that the support of political parties in actual elections does no dwindle to some insignificant level which would no longer justify their status as a political party under the statute. The mere fact that these restrictions were framed differently does not render either one unnecessary to serve the substantial state interest in this area. However, having found that these provisions do serve a substantial state interest, it is still necessary for this Court to delve into the second tier of the constitutional analysis, whether either or both of the restrictions are nonetheless unduly burdensome on the fundamental rights of the plaintiffs. Anderson v. Morris,

supra, 636 F.2d at 57.

In considering the burden of these provisions, it is important to note at the outset that these restrictions, unlike the deadline for submitting the 5,436 signatures considered above, must be analyzed in a broader context than merely that of a special election. The Liberarian Party of Maryland was notified as early as December 1, 1980, that it had lost its status as a political party pursuant to Art. 33, Section 4C-1. The Libertarian Party did not contact State Eliction Officials until February 15, 1981, to begin its new ballot drive and thereby lost valuable time in working towards meeting the statutory requirements. The plaintiffs confuse the issues by attempting to combine the signature requirement for nomination of a candidate by petition and the signature requirement for qualification as a political party.

The former is by its nature confined to the context of a particular election and is therefore subject to deadlines necessitated by the timing of the election, an especially acute problem in the case of a special election. However, the signature requirement for qualification of a political party is part of an ongoing effort by the state to limit political party status and its attendant ballot rights to those organizations which

<page 10>

are able to demonstrate "a significant modicum of support" on a continuing basis. Thus, the burden of the requirements for political party status must be considered in a broader context that that of the signature requirements for nomination by petition in a specific election.

Maryland has chosen to set up a two-part statutory scheme for determining

political party status. In order to qualify initially as a political under the statute, an organization must file petitions signed by at least 10,000 voters of the State. Art. 33, Section 4B-1. This relatively low threshold requirement for initial qualification - less than one percent of the votes cast in the State in 1980 for President - is bettressed by a provision which removes such status from any political party which polls less than three percent of the entire state-wide vote in any election for President or Governor. Art. 33, Section 4C-1. The plaintiffs would have this Court find that because the State has chosen to set a relatively low requirement for initial qualification, the Constitution does not allow the State to require somewhat higher levels of support in order to maintain political party status. This Court rejects such an ar-

gument as baseless under the guarantees of the Constitution and the Supreme Court decisions interpreting them.

The statutory requirement of 10,000 signatures statewide for initial qualification as a political party is a relatively minor restriction and does not unduly burden the rights of those seeking status as a political party. The number of signatures required represents less than one percent of the state-wide vote cast for President in 1980 and there are no significant time restrictions on the collection of such signatures. Obviously, in the case of a special election falling soon after the most recent statewide general election there are time restrictions placed upon those organizations which lost political party status,

<page 11>

but they are not unduly burdensome. In the instant case, the plaintiffs could

have begun their new ballot drive to regain party status as early as November, 1980, a period of time which would have been more than adequate for an organization which was able to collect over 7,000 signatures within the Fifth Congressional District within the space of only one month. The Supreme Court has upheld a Georgia requirement that new political parties acquire petiton signatures of five percent of the registered voters, Jenness v. Fortson, supra, and this Court can find no reason why a statutory scheme requiring less than one percent should not also be upheld.

Maryland does not stop at requiring 10,000 signatures to qualify as a political party but also requires political parties to poll at least three percent of the entire statewide vote in any election for President or Governor or lose their status as a political party. Art. 33,

Section 4B-1. This requirement is clearly more burdensome than the 10,000 signature requirement for obvious reasons. Not only is the number of required supporters higher, but the level of political commitment required is also stronger; supporters need not only sign a petition, they must go out and exercise their franchise in favor of the party's candidate. However, these differences do not automatically render the statutory scheme constitutionally invalid for, as noted above, the requirements for initial qualification in Maryland are relatively low. Furthermore, the statutory scheme provides that a party which loses its status as a political party may regain such status through the ordinary signature provisions of Art. 33, Section 4B-1. Art. 33, Section 4C-1(c). Given all the facets of the statutory scheme for determining political party status, this

Court does not find the automatic denial of party status to the Libertarian Party to represent an unconstitutional burden on the fundamental rights of the plaintiffs.

<page 12>

The State has a substantial interest in requiring a "significant modicum of support" of political organizations before they are given status as political parties under the statute. See, Jenness v. Fortson, supra at 442. That state interest does not disappear once an organization has complied with some initial threshold requirement (sic) has s been set at a relatively unrestricted level. This Court knows of no reason why a state cannot enact a two-part statutory scheme so long as the totality of the restrictions imposed serve a substantial state interest and are not unduly burdensome. Even the most restrictive feature of the

Maryland scheme requires only that a political party poll at least three percent of the state-wide vote and the plaintiffs have failed to demonstrate that this provision is unconstitutionally burdensome. No special effort need be deverted to meeting this requirement, as is the case with signature petition requirements, but rather it is part of the political party's direct effort to elect its candidates in the state-wide elections. If the state was unable to require some continued level of support for political organizations, it would be forced to operate on the assumption that "once a political party, always a political party," an assumption that would not be justified by the realities of our democratic political process. Instead, the State has chose (sic) to require relatively low threshold levels of support for designation as a political

party but then to require, as a condition to maintaining such status, that political organizations evidence their continued and valid support by some minimum showing at the polls. Even where a political party is unable to maintain its status because of failures at the polls, it can regain such status merely by submitting 10,000 new signature petitions. This statutory scheme does not transgress constitutional guarantees of fundamental

<page 13>

rights and, and such, will not be held invalid.

Accordingly, it is this 24th day of April, 1981,. by the United States District Court for the District of Maryland, ORDERED:

1. That the State Election Officials accept all signatures tendered by the plaintiffs on or before April 7, 1981, for purposes of fulfilling the

statutory requirements for nomination by petition in the upcoming special general (sic) election;

2. That if the plaintiff Mathers is found to be otherwise qualified for a position on the upcoming special general (sic) election ballot, his name be listed on the ballots for such election;

3. That the State Election Officials are NOT required to designate the political affiliation of the plaintiff Mathers on the ballot in the upcoming special general (sic) election.

4. That the claim of plaintiffs for representation on the State Administrative Board of Election Laws is held to be abandoned by the plaintiffs and this claim is dismissed without prejudice; and

5. That a copy of this Memorandum Opinion and Order be sent to counsel for the plaintiffs and to the Attorney General for the State of Maryland.

(s) Joseph H. Young

United States

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THOMAS P. MATHERS; E. CHRISTINE FISHBECK; LIBERTARIAN PARTY OF MARYLAND

v.

WILLARD A. MORRIS, in his official capacity as State Administrator of the Election Laws, State Administrative Board of Election Laws; THEODORE N. CLARK, in his official capacity as Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON, in his official capacity as Vice-chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN, in his official capacity as a member of the State Administrative Board of Election Laws; KAREN LANCASTER, in her official capacity as a member of the State Adminstrative Board of Election Laws; SYLVIA RAPHAEL, in her official capacity as a member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS

CIVIL NO. Y-81-622

JUDGMENT

In accordance with the Memorandum Opinion and Order of the Honorable Joseph

H. Young dated April 24, 1981, filed in the above entitled case, it is

ORDERED AND ADJUDGED:

1. That the State Election Officials accept all signatures tendered by the plaintiffs on or before April 7, 1981, for purposes of fulfilling the statutory requirements for nomination by petition in the upcoming special general (sic) election;

2. That if the plaintiff Mathers is found to be otherwise qualified for a position on the upcoming special general (sic) election ballot, his name be listed on the ballots for such election;

3. That the State Election Officials are NOT required to designate the political affiliation of the plaintiff Mathers on the ballot in the upcoming special general (sic) election.

4. That the claim of plaintiffs for representation on the State Administra-

tive Board of Election Laws is held to be abandoned by the plaintiffs and this claim is dismissed without prejudice; and

5. That a copy of this Memorandum Opinion and Order be sent to counsel for the plaintiffs and to the Attorney General for the State of Maryland.

Dated at Baltimore, Maryland this 27th day of April, 1981.

PAUL R. SCHILTZ, Clerk

(s)

BY: ----------
R. Bruce McElhone
Deputy Clerk

APPROVED this 28th day of April, 1981.

Joseph H. Young
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-1363

THOMAS P. MATHERS; E. CHRISTINE FISHBECK; LIBERTARIAN PARTY OF MARYLAND,

Appellees,

v.

WILLARD A. MORRIS, in his official capacity as State Administrator of the Election Laws, State Administrative Board of Election Laws; THEODORE N. CLARK, in his official capacity as Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON, in his official capacity as Vice-chairman of the State Administrative Board of Election Laws; REGINALD A. ASPLEN, in his official capacity as a member of the State Administrative Board of Election Laws; KAREN LANCASTER, in her official capacity as a member of the State Adminstrative Board of Election Laws; SYLVIA RAPHAEL, in her official capacity as a member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS,

Appellants.

NO. 81-1393

Thomas P. MATHERS, et al.,

Appellants,

v.

Willard A. MORRIS, in his official capacity as State Administrator of the Election Laws, et al.,

Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued May 6, 1981 Decided

Before WINTER, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

PER CURIAM:

The Maryland State Administrator of Election Laws and the State Administrative Board of Election Laws appeal from a decree of the district court granting access to the ballot for the special general election to the United States Congress in the Fifth Congressional District to be held on May 19, 1981, to Thomas P. Mathers, the nominee of the

Libertarian Party of Maryland, provided that he satisfied the signature requirements for nomination by petiton on or before April 7, 1981. Mathers, a voter who desires to vote for him, and the Libertarian Party of Maryland, cross appeal from the portion of the decree providing that if Mathers is given a place on the ballot his political affiliation as a candidate of the Libertarian Party need not be shown.

We have considered the record, the briefs of the parties and the oral argument of their counsel. We agree with the district court for the reasons assigned by it that Mathers must be afforded a place on the ballot since he produced the requisite number of signatures to a nominating petition by April 7, 1981. We further agree for the reasons assigned by the district court that since the Libertarian Party lost its status as a poli-

tical party because it failed to poll at least 3 percent of the votes cast at the general election of November

<page 3>

1980 and since it has not thereafter re-established itself as a political party by filing petitions signed by at least 10,000 qualified voters of the state, Mathers' name may not appear on the ballot with a party designation. We affirm on the Memorandum Opinion and Order of the district court. Thomas P. Mathers, et al. v. Willard A. Morris, et al., Civil No. Y-81-622 (D. Md. April 24, 1981).

AFFIRMED.

Opposition

FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS P. MATHERS, ET AL.,

Petitioners,

v.

WILLARD A. MORRIS, STATE ADMINISTRATOR OF ELECTIONS LAWS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court in accordance with *American Party of Texas v. White*, 415 U.S. 767 (1974) and *Jeness v. Fortson*, 403 U.S. 431 (1971), properly held that a candidate has no right to designate on the ballot, as the "party" with which he is affiliated, a formerly qualified political party, that lost its party status by failure to obtain 3% of the vote in the previous General Election, and failed to requalify as a political party by obtaining petition signatures of less than 1% of the voters?

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT:	
The Sole Question Presented Warrants No Review By This Court; It Is Neither Novel Nor The Subject Of Conflict Among The Circuits, Rather It Was Correctly Decided By The Lower Court In Accordance With The Decisions Of This Court	5
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

American Party of Texas v. White, 415 U.S. 767 (1974) 4, 6, 7, 9

Illinois State Board of Elections v. Socialists Worker's Party, 440 U.S. 173 (1979) 7, 8

Jenness v. Forston, 403 U.S. 431 (1970) 4, 5, 6, 7, 8, 9

Lubin v. Panish, 415 U.S. 709 (1974) 8, 9

Mandel v. Bradley, 432 U.S. 173 (1977) 9

Mathers v. Morris, 515 F. Supp. 931 (D. Md.) *aff'd* 649 F.2d 280 (4th Cir. 1981) 3, 4, 5, 6, 8

Storer v. Brown, 415 U.S. 724 (1974) 7, 8, 9

Statutes

Annotated Code of Maryland (1957) (1976 Repl. Vol.):

Article 33—

§ 1-1(a)(15) 2, 3, 6

§ 4A-3 ..... 2, 3, 4

	PAGE
§ 4B-1	2, 6
§ 4B-1(h)	2
§ 4C-1	3, 4, 6, 8
§ 4C-1(c)	3, 4, 6
§ 5-1	2
§ 7-1 (1980 Cum Supp.)	3, 4
§ 7-1(b)(2)	2
§ 7-1(c)(3)	2
§ 9A-1	2, 3, 4, 6

No. 81-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS P. MATHERS, ET AL.,

Petitioners,

v.

WILLARD A. MORRIS, STATE ADMINISTRATOR OF ELECTIONS LAWS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The office of the United States Representative for the Fifth District of Maryland was declared vacant on February 24, 1981 by resolution of the United States House of Representatives. Two days later, the Governor of Maryland issued a proclamation directing that a special primary election be held on April 7, 1981 and a special general election on May 19, 1981 to fill this vacancy. On March 6, 1981, the Libertarian Party of Maryland (hereinafter the Party) nominated Thomas P. Mathers

(hereinafter Mathers) as its candidate for the Congressional seat to be filled by the special election.

Under Maryland law, all candidates were required to file their certificates of candidacy no later than 21 days before the primary, in this instance, March 16, 1981. Annotated Code of Maryland, Article 33, § 4A-3. While major party (those parties with which 10% or more of the registered voters are affiliated — Annotated Code of Maryland, Article 33, § 5-1) candidates were required to campaign and prevail in a primary, all other candidates were obliged to submit signatures totaling three percent of the registered voters eligible to vote for the office (5,436 signatures in this case) by March 16th in order to win a place on the special election ballot. Annotated Code of Maryland, Article 33, § 4B-1(h) and § 7-1(b)(2) and (c)(3). Moreover, under Maryland law a candidate for public office is not permitted to designate his political affiliation on the ballot unless he is affiliated with a qualified political party. Annotated Code of Maryland, Article 33, § 9A-1. A qualified political party is defined as one which has polled at least 3% of the vote in the last statewide election or has, since that election, filed petitions signed by 10,000 registered voters. Annotated Code of Maryland, Article 33, § 1-1(a)(15).

Prior to November 4, 1980 general election, the Libertarian Party qualified as a political party in Maryland by successfully filing petitions signed by 10,000 voters. Annotated Code of Maryland, Article 33, § 4B-1. Having duly nominated and qualified Ed Clark as its candidate for President, the Party was entitled to and did designate Clark as the "Libertarian" candidate on General Election Ballot pursuant to Annotated Code of Maryland, Article 33, § 9A-1. Because of the failure of this designated candidate to poll at least three percent of the vote statewide in the General Election (Clark polled 14,192

votes or .9% of the vote), the Party lost its status as a political party. Annotated Code of Maryland, Article 33, § 4C-1. The Party was officially notified by state election officials on December 1, 1980 of this loss of political party status. Although statutorily permitted to regain its status as a political party by filing 10,000 petition signatures, Annotated Code of Maryland, Article 33, § 4C-1(c), the Party failed to do so.

On March 10, 1981, Mathers requested the State Administrator of Elections to permit Mathers' name to be placed on the General Election Ballot and to designate him the "Libertarian" candidate even though Mathers had not collected the required number of petition signatures pursuant to Sections 4A-3 and 7-1, and the Libertarian Party was not a qualified political party pursuant to Sections 9A-1 and 1-1(a)(15). The Administrator refused to ignore these provisions of the Election Code. On March 16, 1981, Mathers filed 1,156 petition signatures. Of the signatures submitted, only 908 were valid. This was far short of the 5,436 signatures needed and the state election officials refused to place Mathers' name on the ballot. (In anticipation of litigation, Mathers gathered an additional 6,309 signatures. According to an affidavit filed by the Libertarian Party Chairman, the additional signatures were gathered within 10 days).

On March 19, 1981, Mathers, Christine Fishbeck, a voter desiring to vote for him, and the Libertarian Party of Maryland filed suit in the United States District Court the District of Maryland to obtain for Mathers a place on the special election ballot and to have Mathers designated as the candidate of the Libertarian Party.

The case was heard in the district court on an expedited basis on cross motions for summary judgment and a joint stipulation of facts. On April 24, 1981, the court issued its opinion, *Mathers v. Morris,* 515 F. Supp. 931 (D. Md.

1981), in which it concluded that § 4A-3 and § 7-1 were unconstitutional as applied to Mathers, that Mathers was entitled to have his additional signatures counted and, if 5,436 were valid, he was entitled to access to the special election ballot. 515 F. Supp. 933-935. However, the Court further found, specifically relying upon *Jenness v. Fortson*, 403 U.S. 431 (1971) and *American Party of Texas v. White*, 415 U.S. 767 (1974), that Maryland's "statutory scheme for determining political party status," — *i.e.*, 10,000 signatures to qualify as a political party, § 4B-1, and a polling of at least 3% of the statewide vote in order to retain party status, § 4C-1, with the proviso that party status may be regained by again filing 10,000 signatures, § 4C-1(c) — was constitutional. Accordingly, the Court concluded that since the Libertarian Party was admittedly not qualified as a political party under Maryland law, state election officials properly refused, pursuant to Annotated Code of Maryland, Article 33, § 9A-1, to designate Mathers' political affiliation as a Libertarian on the ballot. 515 F. Supp. 935-938.

Following expedited appeals, by both sides, the United States Court of Appeals for the Fourth Circuit, on May 6, 1981, affirmed the decision of the district court in all respects and in a per curiam opinion adopted the reasoning of the lower court. *Mathers v. Morris*, 649 F.2d 280 (4th Cir. 1981).[1]

On May 19, 1981, the special election was held. Hoyer polled 42,573 votes; Scott 33,708; and Mathers, 960.

The Libertarian Party and Mathers petitioned this

[1] The lower court's holding that the ballot access restrictions on independent candidates contained in Sections 4A-3 and 7-1 were unconstitutional, a holding that disregarded the teachings of this Court and failed to consider past experience, political realities or the substantiality of the respective burdens of party and non-party candidates, is the subject of an appeal filed by the State. *Morris v. Mathers*, No. 81-240 filed August 4, 1981.

Court for a writ of certiorari on the question of Mathers' alleged right to designate on the ballot a non-qualified political party as the party with which he was affiliated.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to declare unconstitutional a statutory scheme for determining party status which requires a group wishing to be treated as a political party to poll at least *3%* of the statewide vote at a General Election or, after that election, gather 10,000 (less than *1%* of the vote) petition signatures. The lower court, in a careful and well-reasoned opinion, applied the standard and principles mandated by this Court in ballot access cases, to correctly uphold this statute. *Mathers v. Morris,* 515 F. Supp., 931, 935-938 (D. Md.) *affd.,* 649 F.2d 280 (4th Cir. 1981). Among other cases, the lower court relied upon *Jenness v. Fortson,* 403 U.S. 431 (1971), in which the constitutionality of a very similar statute, that required a group seeking party status to obtain petitions from *5%* of the voters, was upheld by this Court. The Petitioners do not suggest that *Jenness* should be overruled or that the instant decision is novel or the subject of conflict among the circuits. In fact it is not. It is correct and, indeed, mandated by the decisions of this Court. Accordingly, the petition for writ of certiorari should be denied.

ARGUMENT

THE SOLE QUESTION PRESENTED WARRANTS NO REVIEW BY THIS COURT; IT IS NEITHER NOVEL NOR THE SUBJECT OF CONFLICT AMONG THE CIRCUITS, RATHER IT WAS CORRECTLY DECIDED BY THE LOWER COURT IN ACCORDANCE WITH THE DECISIONS OF THIS COURT.

The Petitioners — Mathers and the Libertarian Party — ask this Court to hold that a state's refusal to permit a candidate to designate on the ballot, a body not qualified as a political party, as his "party" affiliation unconstitu-

tionally "burdens fundamental rights." Petition for Writ of Certiorari at 36. Under Maryland law a candidate may not designate his political affiliation on the ballot unless he is affiliated with a qualified political party. Annotated Code of Maryland, Article 33, § 9A-1. A group qualifies as political party either by polling 3% or more of the entire vote cast in the State in the last General Election or, after that election, files valid petition signatures of 10,000 voters. Annotated Code of Maryland, Article 33, § 1-1(a)(15). Mathers and the Party concede that the Libertarian Party is not a qualified political party.[2] They maintain that a state may not constitutionally require a political body to so qualify as a political party prior to affording it the right to be designated as the party affiliation of a candidate on the ballot. The lower court, specifically relying on the *Jenness v. Fortson*, 403 U.S. 431 (1971), and *American Party of Texas v. White*, 415 U.S. 767 (1974), correctly rejected this claim. *Mathers v. Morris*, 515 F. Supp. at 935-938.

As the lower court noted, this Court has "clearly recognized [in *Jenness* and *American Party of Texas*] the State interest in requiring candidates and political parties to demonstrate some degree of support before granting them access to the ballot." 515 F. Supp. at 936. The lower court carefully analyzed Maryland's "two-part statutory scheme for determining political party status" and con-

[2] Prior to the November general election, the Libertarian Party qualified as a political party by successfully filing petitions signed by 10,000 voters. Annotated Code of Maryland, Article 33, § 4B-1. Because of the failure of its designated candidate — Ed Clark — to poll at least 3% of the vote statewide in the General Election (Clark polled 14,192 votes or .9% of the vote), the Party lost its status as a political party. Annotated Code of Maryland, Article 33, § 4C-1. The Party was officially notified by state election officials on December 1, 1980 of this loss of political party status. Although statutorily permitted to regain its status as a political party by filing 10,000 petition signatures, Annotated Code of Maryland, Article 33, § 4C-1(c), the Party failed to do so.

cluded that it was indeed constitutional under the guidelines set forth by this Court in those cases. Specifically, the lower court found this statutory scheme served substantial state interests and was not unduly burdensome.

The Petitioners' principal argument in this Court appears to be that the lower court applied the wrong test in upholding the constitutionality of Maryland's statutory scheme for determining party status. That is, Mathers and the Party argue that the district court required a "substantial" state interest be found to justify the statute rather than a "compelling" interest and that it required that the statute not be "unduly burdensome" rather than the "least drastic means," and that in using these different words the lower court "applied a lesser standard than that mandated by this Court." Petition for Certiorari at 26. This argument is totally without merit. For this Court, in stating the appropriate test to be applied in ballot access cases, has used the English language to the fullest and articulated the test using a number of different words; indeed the Court has on several occasions used precisely the language of the lower court here.[3] Thus, contrary to the Petitioners' contentions the precise words employed by a court are unimportant, provided of course, a court's

[3] In *Illinois Election Bd. v. Socialist Workers Party*, 440 U.S. 173, 185 (1979), the very case upon which Petitioners rely, this Court did describe the interest the State must establish as "compelling" but in other instances in the same case the interest is characterized as "legitimate." 440 U.S. 185; in *Jenness v. Fortson*, 403 U.S. 431 (1971), this interest is described as "important." Similarly in *Storer v. Brown*, 415 U.S. 724 (1974), the Court discussed at length the factual findings necessary to determine if a statute, even one serving an important or compelling or legitimate or substantial state interest is "too great a burden" 425 U.S. at 740 and in *American Party of Texas v. White*, 425 U.S. 767, 788 (1974), the applicable standard is stated as whether the State imposes "unduly burdensome" conditions. All of these are obviously simply different ways of articulating the same standard.

analysis is correct. In this case, it is abundantly clear that the lower court carefully analyzed this question and correctly applied the test and principles mandated by this Court in ballot access cases.

First, the lower court articulated the substantial state interests as follows:

> The requirement for initial qualification prevents frivolous political organizations from gaining access to the ballot and thereby serves to preserve the order and integrity of the electoral process. The provisions of Art. 33, § 4C-1 which govern loss of status as a political party serve the same state interest by assuring that the support of political parties in actual elections does not dwindle to some insignificant level which would no longer justify their status as a political party under the statute. 515 F. Supp. at 936.[4]

These are, of course, precisely the interests which this Court has recognized as "legitimate," "important," "substantial" or "compelling" time and again in ballot access cases. (*See, e.g., Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Lubin v. Panish*, 415 U.S. 709, 715-16 (1974); *Storer v. Brown*, 415 U.S. 724 (1974). Indeed these are the interests which this Court held in *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), justified a requirement that a group obtain the signatures of 5% of the registered voters in order to attain party status.

[4] Nor does the fact that Maryland has a two-part statutory scheme for determining political party status render that scheme unconstitutional. In the lower court the petitioners here argued that "because the State has chosen to set a relatively low requirement for initial qualifications, the Constitution does not allow the State to require somewhat higher levels of support to maintain political party status." 515 F. Supp. at 937. The lower court correctly "reject[ed] such an argument as baseless under the guarantees of the Constitution and the Supreme Court decisions interpreting them." *Id.* The Petitioners seem to be persuaded by this reasoning for they appear to have abandoned this argument.

Secondly, the lower court also examined Maryland's scheme and found it not "unduly burdensome" explaining:

> Even the most restrictive feature of the Maryland scheme requires only that a political party poll at least three percent of the state-wide vote and the plaintiffs have failed to demonstrate that this provision is unconstitutionally burdensome. . . . the State has chosen to require relatively low threshold levels of support for designation as a political party but then to require, as a condition to maintaining such status, that political organizations evidence their continued and valid support by some minimum showing at the polls. Even where a political party is unable to maintain its status because of failures at the polls, it can regain such status merely by submitted 10,000 new signature petitions. 515 F. Supp. at 938.

This practical analysis of burden is exactly that mandated by the Court in ballot access cases. *See, e.g., Mandel v. Bradley,* 432 U.S. 173, 177 (1977); *Storer v. Brown,* 415 U.S. 724, 742 (1974); *Lubin v. Panish,* 415 U.S. 709, 708 (1974). Moreover, as the lower court noted, Maryland's alternative requirements of either 3% of the vote or petition signatures of 10,000 voters (less than 1%) are obviously less burdensome than the 5% requirement upheld in *Jenness v. Fortson,* 403 U.S. 431, 442 (1971).

The lower court was clearly correct in upholding the Maryland statutory scheme for determining party status and concluding that a candidate has no right to designate as the political party with which he is affiliated, a group which has failed to meet the requirements set forth in this scheme. Indeed, this conclusion is mandated by this Court's decisions in *American Party of Texas v. White,* 415 U.S. 767 (1974), and *Jenness v. Fortson,* 403 U.S. 431 (1971).

Moreover, unlike the lower court's decision with regard to the constitutionality of ballot access restrictions on

independent candidates (see footnote 1, *supra*) review of the decision challenged by this Petition is not necessary to resolve any conflicts or dispel any confusion among the federal courts. There is no conflict. Even the Petitioners do not allege otherwise.

CONCLUSION

In summary, the request of the Party and Mathers that this Court grant plenary review on this question should be denied. The lower court's decision was correct, and in accord with the principles contained in this Court's decisions. Review would not serve any interest other than to afford the Petitioners one more opportunity to present an argument totally without merit. For these reasons, the State respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THOMAS P. MATHERS, ET AL.,
Petitioners,

v.

WILLARD A. MORRIS, STATE ADMINISTRATOR OF ELECTIONS LAWS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF ON CERTIORARI

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IN THE UNITED STATES SUPREME COURT

THOMAS P. MATHERS, et al.,

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v.

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REPLY BRIEF ON CERTIORARI

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT INCORRECTLY APPLIED THE TEACHINGS OF AMERICAN PARTY OF TEXAS V. WHITE, 415 U.S. 767 (1974) AND JENNESS V. FORTSON, 403 U.S. 431 (1971).

II. WHETHER MARYLAND'S REFUSAL TO DESIGNATE THE POLITICAL AFFILIATION OF MR. MATHERS ON THE BALLOT FAILS THE TEST OF STRICT SCRUTINY BECAUSE OF THE STATE'S FAILURE TO ASSERT ANY COMPELLING STATE INTEREST TO JUSTIFY THE ADDITIONAL BURDENS IMPOSED ON FUNDAMENTAL RIGHTS.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....2

The District Court incorrectly applied the teachings of American Party of Texas v. White, and Jenness v. Fortson.....2

Maryland's refusal to designate the political affiliation of Mr. Mathers on the ballot fails the test of strict scrutiny because of the State's failure to assert any compelling state interest to justify the additional burdens imposed on fundamental rights.....10

CONCLUSION.....16

TABLE OF AUTHORITIES

CASES:

American Party of Texas v White,
415 U.S. 767 (1974).....passim

Jenness v. Fortson,
403 U.S. 431 (1971).....passim

Mathers v. Morris,
515 F. Supp. 931 (D. Md.), aff'd,
649 F. 2d 280 (4th cir.1981)..passim

STATUTES:

Annotated Code of Maryland
(1957) (1976 Repl. Vol.):
Article 33,
Section 1-1(a)(15).....6, 14

Section 4B-1.....6

Section 4B-1(h).....6

Section 7-1 (1980 Supp.).....6

Section 9A-1.....3, 10

SUMMARY OF ARGUMENT

In their Brief in Opposition to Petition for Writ of Certiorari, the Respondents have phrased the question presented by the Petitioners as:

> "Whether the lower court in accordance with American Party of Texas v. White, 415 U.S. 767 (1974) and Jeness (sic) v. Fortson, 403 U.S. 431 (1971), properly held that a candidate has no right to designate on the ballot, as the 'party' with which he is affiliated, a formerly qualified political party, that lost its party status by failure to obtain 3% of the vote in the previous General Election, and failed to requalify as a political party by obtaining petition signatures of less than 1% of the voters?"

This superficial approach to the issue presented should fail for two reasons: first, it grossly overstates the holdings of both Jenness and American Party of Texas; and second, it does not address the central query, "whether the statute

here challenged can withstand close constitutional scrutiny?"

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY APPLIED THE TEACHINGS OF AMERICAN PARTY OF TEXAS V. WHITE, 415 U.S. 767 (1974) AND JENNESS V. FORTSON, 403 U.S. 431 (1971).

Maryland's election code is radically different from the statutory schemes reviewed by this Court in American Party of Texas v. White, 415 U.S. 767 (1974) and Jenness v. Fortson, 403 U.S. 431 (1971). Although every state has enacted legislation requiring some demonstration of support, by primary election, petition, or local or statewide convention, before granting candidates ballot position, Maryland is unique in requiring some candidates to demonstrate a second tier of support before listing their political designation on the bal-

lot. What serves to make this peculiar statutory scheme suspect is that only minority party candidates must demonstrate this second tier of support, independents are specifically excluded by the statutory provision in question. Maryland Annotated Code, Article 33, Section 9A-1.

Generally, the States have adopted one of two approaches to ballot access. Some States require minority political organizations to demonstrate a significant modicum of support in order to gain the status of "party" or "political party." This required showing of support may take the form of petition requirements, minimum attendance requirements at local or statewide conventions, requirements for polling a specific percentage of votes cast in a recent statewide elec-

tion, or some combination of the three. Once granted the status of a "political party," however, such organizations typically have the power to nominate an entire slate of candidates for public office without the need to gather additional petitions or otherwise demonstrate support for the individual candidates on the slate.

American Party of Texas v. White, supra, involved a challenge to Texas statutes employing this first approach to ballot access. The District Court mistakenly relied on American Party of Texas to buttress its holding that a state statutory scheme may require a candidate to demonstrate a significant modicum of support to gain a position on the ballot and then require the political organization with which he is affiliated to

demonstrate an additional modicum of support before printing that candidate's political affiliation. Mathers v. Morris, 515 F. Supp. 931, 938 (1981). In fact, under the challenged Texas statutes, a minority political organization could nominate and qualify an entire slate of nominees by meeting one of two criteria, it could either have polled two percent of the total votes cast in the last general election or have conducted precinct conventions attended by registered voters equal to one percent of the total votes cast for governor in the last general election. American Party of Texas v. White, supra, at 772-75 n.4-6.

The Libertarian Party of Maryland would be delighted to discover that it could nominate and qualify an entire slate of candidates for public office by

merely restoring its status as a "political party," pursuant to Article 33, Section 4B-1. Maryland's statutory scheme, however, provides that each nominee of a minority political party, even those organizations which have achieved status as a "political party," as defined in Article 33, Section 1-1(a)(15), must also meet all of the additional requirements for nomination by petition, including filing nominating petitions containing signatures of three percent of the registered voters eligible to vote for the office sought. Article 33, Sections 4B-1(h) and 7-1.

Other States have adopted a second approach to ballot access, placing the burden of showing a significant modicum of support on the nominees of minority political organizations. This required

demonstration of support usually takes the form of nominating petitions containing signatures of a percentage of registered voters eligible to vote in the election or a percentage of voters who actually cast votes for the same office in a previous election. Generally, the nominating petition bears the name of the candidate and the political organization, if any, with which he is affiliated. Once assured a position on the ballot, however, such candidates usually have the option to designate their political affiliation without meeting additional requirements.

Jenness v. Fortson, supra, involved a challenge to Georgia statutes employing this second approach to ballot access. As with American Party of Texas, the District Court mistakenly relied on

Jenness to buttress its holding that a state statutory scheme may require a candidate to demonstrate a significant modicum of support to gain a position on the ballot and then require an additional demonstration of support before printing the name of the political organization with which he is affiliated on the ballot. Mathers v. Morris, supra, at 938. In fact, that question never arose in Jenness because this Court determined that the candidate, himself, was not entitled to a position on the Georgia ballot. It was in this limited context that this Court stated:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot."

Jenness v. Fortson, supra, at 442.

(emphasis supplied).

Both of these cases are inapposite to the instant one. Neither supplies any justification for a two-tier approach to ballot access. Unlike Jenness and American Party of Texas, this case involves a candidate who has successfully earned a place on the ballot who merely seeks to compete with independent and major party candidates on an equal footing. In the context of this special election, Maryland saddled Mr. Mathers with two hefty petitioning requirements: three percent of the registered voters eligible to vote in the election to place his own name on the ballot and an additional ten thousand signatures to list his political designation. The total number of signatures required equaled eight percent of the voters eligible to

vote in the special election!

This is a case of first impression and provides this Court a rare opportunity to clearly delineate the basic principles of election law.

II. MARYLAND'S REFUSAL TO DESIGNATE THE POLITICAL AFFILIATION OF MR. MATHERS ON THE BALLOT FAILS THE TEST OF STRICT SCRUTINY BECAUSE OF THE STATE'S FAILURE TO ASSERT ANY COMPELLING STATE INTEREST TO JUSTIFY THE ADDITIONAL BURDENS IMPOSED ON FUNDAMENTAL RIGHTS.

In its Brief, the State glosses over the dispositive issue before this Court: whether Article 33, Section 9A-1, withstands close constitutional scrutiny. More precisely framed: given that a minority party candidate has successfully demonstrated that modicum of support necessary to justify his place on the ballot, whether some compelling state interest is furthered by denying that candidate the designation of his politi-

cal affiliation and forcing him to run under the disabling designation of "other candidate."

Whether the District Court applied the wrong test or applied the correct test framed in imprecise language is immaterial, the fact is that the State has failed to assert ANY compelling state interest to justify imposing these additional substantial burdens on the fundamental rights of a minority party candidate. And by failing to even assert such an interest, the State must necessarily forfeit its cause.

The State concedes, as it must, that the correct test of the constitutionality of Article 33, Section 9A-1, is that of strict scrutiny. Brief in Opposition to Petition for Writ of Certiorari at 7-8. In its Brief, however, the State asserts

that the District Court was correct in "concluding that a candidate has no right to designate as the political party with which he is affiliated, a group which has failed to meet the requirements set forth in this scheme." This belies the State's fundamental misunderstanding of the constitutional principles here involved. Where substantial burdens are imposed upon the fundamental rights of speech and political expression, the duty is not upon the speaker to establish his right to speak, the duty is upon the State to justify the burdens imposed.

The State's interests in maintaining a political system free from factionalism, avoiding laundry list ballots and the "Balkanization" of the electorate, minimizing voter confusion, enhancing political stability and protecting

the effective free exchange of ideas may well justify the imposition of substantial burdens on ballot access for all candidates; independent, major party and minority party candidates alike. Defendant's Memorandum in Support of Motion for Summary Judgment, Mathers v. Morris, (D.Md. April 24, 1981) at 24. Once these important interests are adequately protected, however, as the Maryland legislature has deemed they are by its statutory scheme for nomination by petition or by primary election, then clearly some ADDITIONAL INTEREST must be established to justify those ADDITIONAL BURDENS which fall unequally upon minority party candidates.

Maryland's election code expressly contemplates that each candidate seeking nomination by petition will demonstrate

that "modicum of support" necessary to justify his position on the ballot by gathering signatures of three percent of the voters eligible to vote in the election. Even if the Libertarian Party of Maryland were a "political party," within the meaning of Maryland's statutory scheme, its candidates would still face the three percent nominating petition requirement applicable to every candidate seeking nomination by petition. Because support of three percent of the eligible voters is deemed adequate support by the State to justify a candidate's place on the ballot, the additional requirement of ten thousand signatures, mandated by Article 33, Section 1-1(a)(15), to achieve the status of "political party" for the organization with which the candidate is affiliatied is clearly unnec-

essary to achieve those interests asserted by the State.

Moreover, the nominating petitions submitted by Mr. Mathers to demonstrate the requisite level of support carried both the name of the candidate and his political affiliation. Any interest the State could assert is negated by the requirement that nominating petitions bear the affiliation of the candidate. Forcing a candidate to run as a "mystery" candidate is, at the very least, counterproductive to the State's stated goals of reducing the opportunity for fraud and reducing voter confusion. Those voters who sign should rightfully expect the candidate's name to appear with the designation carried on that candidate's nominating petition.

CONCLUSION

In summary, the State of Maryland seeks to obscure rather than address the real issue in this case - the absence of even a putative state interest to justify imposing harsher burdens on minority party candidates than it imposes on independent or major party candidates. Viewed from the prospective of a minority party candidate who has already complied with the substantial requirements of nomination by petition to earn a place on the ballot, the burden of collecting an additional ten thousand signatures or running as an "other candidate" is an especially onerous one because neither independent nor major party candidates need raise a finger to assure their preferred designation on the ballot. This harsher burden, unsupported by even an

assertion of a state interest to justify it, must fall under the strict constitutional scrutiny mandated by this Court.

Respectfully submitted,

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